



NOV 8 1983

MEMORANDUM

SUBJECT: CRC Comments to Removal Options identified at
Meeting of November 2, 1983 re: Filr Chips

FROM: Jonathan T. McPhee
Assistant Regional Counsel

TO: William M. Sanders, Director
Environmental Services Division

ATTN: Mary Gade

I have reviewed the five options identified by your staff in the briefing paper handed out at the meeting on November 2, 1983. You have directed that CRC prepare comments to the five options addressing any "liabilities" that might accrue through their implementation. My comments are as follows:

First, I have a general concern that the long-term remedy has not been sufficiently identified, and that selection of a removal response may adversely affect the cost of remedial action. Selection of an immediate response that causes increased remedial costs may complicate cost recovery actions if viable defendants can be located.

Second, I would remark generally that Mary Ellen Lynch's observations on transport of any of this material to Dixon for storage are well grounded. The Illinois Statutes, Ch. 110 1/2, give effective veto power to the county over establishment of new, or expansion of existing, "regional pollution control facilities." The definition of such facilities would clearly include the present warehouse area and any addition of material we might make. While broad authority is given EIA by Congress under CERCLA to respond to hazards in emergency situations, the county could tie up any transport to Dixon by litigation seeking to require us to obtain county approval. We run the same risk with citizen suits even if the county gives us permission. There are strong defenses to any such actions, including necessity as part of our "police powers" function, but such actions could still delay any transport to Dixon substantially.

On the other side, Federal emergency storage permits under RCRA are readily available and can be issued through the Region, so there is no Federal bar to movement of this material to Dixor. Of course, any movement would be subject to the requirements of 49 CFR (DOT regulations) and the manifesting and facility standards of RCRA regulations.

As to the more temporary options (1, 3 and 5), with respect to the material that might be treated or re-containerized on the Chicago-area sites, I do not believe that we face any substantial "liabilities" other than the unavoidable risk of specious litigation by terminal owners, trustees of same in bankruptcy, or the Attorney General's office. By applying immediate response containment measures, such as covers, recontainerization, "leachate" collection and the like, we do not become generators, owners or operators in connection with this material. These definitions have applied, and continue to apply, to the fill recovery sites and terminal owners and operators.

Our decision to move, cover or treat the material is a discretionary decision subject to limited judicial review and not generally subject to mandamus or injunctive actions by citizens or other third parties. By the same token, our decision must be based on the criteria that Congress and the National Contingency Plan have set forth. I note that several of the options (3 and 4) call for extensive, and extensive, treatment of the chips at each site. This approach seems shaded toward the longer-term remedial approach that the Waste Management Division is working on. Setting up and operating treatment facilities at the several truck terminals may create problems with interference with business there and the need to pay rent. My feeling is that Option 5 presents a response that is most consistent with the NCP and least likely to expose the Agency to unnecessary litigation, expense and other problems.

cc: Mary Ellen Lynch
✓ Michael C'Toole